

EIS Member briefing:

The Gender Recognition Reform (Scotland) Bill

Introduction

On the 3rd March 2022, the Scottish Government published the Gender Recognition Reform Bill, which set out plans for amending the process transgender people have to go through to change their legal sex to match their gender identity. The process for changing legal sex has been in place in the UK since 2004 but has been described as intrusive and out of date.

Over recent years, the EIS has observed a rise in toxic debate and misinformation around the proposed changes, and the existing rights of transgender people, and is aware that many members will be unsure what the implications of the Gender Recognition Reform Bill are.

The EIS has a commitment to high standards of education rooted in equality and inclusivity. The EIS's overarching position is the principle that young people have the right to learn, and teachers and lecturers have the right to work, in an educational environment that is free from discrimination, where the rights of all are equally upheld.

The original version of this briefing, published in March 2022 gave an overview of the Gender Recognition Act 2004 (GRA), the proposed reforms, and the EIS position.

The briefing has been updated, following the passing of the GRA Reform (Scotland) Bill by the Scottish Parliament and the later announcement of the UK Government's intention to block its implementation.

The EIS is conscious that this may be a time of heightened uncertainty for members in relation to the GRA, and has therefore expanded certain sections of this guidance to provide further information and clarification of what is expected of education professionals.

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Transgender people in Scotland

There is no accurate figure of the transgender population in the UK, however estimates would suggest that there are around 30,000 transgender people in Scotland – roughly 0.2% of the population.

Transgender people are protected from discrimination, harassment, and victimisation under the Equality Act (2010). Unfortunately, many transgender people still experience discrimination and inequality because of who they are. In 2017, LGBT Youth Scotland found that 82% of trans young people experienced bullying in school.

There is widespread lack of awareness, visibility, and accurate representation of trans people across all spheres of society, although this has improved somewhat in recent years with some representation in TV-shows and other media productions.

The Gender Recognition Act (2004)

Scotland is required to have a system for obtaining legal gender recognition, to comply with Article 8 and Article 12 of the European Convention on Human Rights. The GRA, which has been in place since 2004, sets out the process in which transgender people can change their birth certificate, to have their gender identity recognised as their legal sex.

Legislation related to equality matters (including the Equality Act 2010) are reserved, meaning they are considered to remain the responsibility of the UK Parliament. However, the matter of gender recognition is devolved in Scotland, meaning the Scottish Parliament is able to legislate on gender recognition.

Trans people in Scotland can already legally change their sex without a Gender Recognition Certificate (GRC) on their passport and driver's licence, but not on their birth certificate, which they may need to obtain pension rights or get married.

Currently, to obtain a GRC, trans people are required to, amongst other criteria, be over 18 years of age, have obtained a formal diagnosis of gender dysphoria, provide evidence that they have lived in their 'acquired gender' for two years, and make an application to a panel of medical and legal experts who will either deny or approve the application. Currently, in the case where the applicant is married, they must have spousal consent to proceed with the application.

In comparison, many other European countries, such as Portugal, Ireland, and Norway, have already made it such that legal recognition can be obtained on the basis of self-declaration.

The EIS is supportive of a self-declaration system for gender recognition and for the process to be made more accessible, recognising the detrimental impact of the current process on transgender people's mental health and wellbeing. The EIS is clear that trans women are women and trans men are men.

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Reform under the Gender Recognition Reform (Scotland) Bill

The main reforms within the Gender Recognition Reform (Scotland) Bill as passed on the 22nd December 2022 are:

- To lower the age at which a trans person can apply for a GRC, from 18 to 16, bringing this in line with voting rights in Scottish elections.
- To require a statutory self-declaration instead of medical evidence and a psychiatric diagnosis.
- To reduce the requirement to show evidence that you have lived in your gender for two years, to three months, with an added three-month reflection period after an application has been made.

There will be no changes, or new exemptions, to the Equality Act (2010) as a result of the Gender Recognition Reform (Scotland) Bill

The Bill passed by a majority of 86 to 39, with no abstentions. The Bill is one of the most consulted on pieces of legislation in the history of the Scottish Parliament, with the consultation process including numerous rounds of evidence gathering, and nine months of scrutiny by the Scottish Parliament.

There will be no changes, or new exemptions, to the Equality Act (2010) as a result of the Gender Recognition Reform (Scotland) Bill. The minor reforms within the GRCC (Scotland) Bill would, however, have a major impact on improving the wellbeing and dignity of trans people who are seeking legal gender recognition.

The Scottish Government estimates that the changes will mean a higher number of applicants for GRCs. Currently about 30 are granted every year in Scotland.

The Equality Act (2010)

The Equality Act legally protects people from discrimination in the workplace and wider society, prohibiting discrimination on the basis of protected characteristics.

Protected characteristics are age, sex, sexuality, disability, pregnancy, race, religion, marital status, and gender reassignment.

There are a limited number of exemptions, for example, cases where it is permitted to provide a different service on the basis of a protected characteristic. With relevance to schools, these can be found in the Technical Guidance for Schools, which outlines the requirements of the Equality Act (2010) for schools in relation to the provision of education.

In late 2021, the EIS Equality Committee developed a briefing for members on the Scottish Government's updated guidance on supporting transgender pupils in schools. The purpose of the briefing is to inform members of the refreshed Scottish Government advice and provide details of key technical updates within it.

The briefing includes a question-and-answer section informed by EIS legal advice on the Equality Act (2010) and the technical guidance in relation to pupils protected by the characteristic of

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‘gender reassignment’. Members should consult this briefing, and the Scottish Government guidance, for advice on how to support transgender young people in schools.

With relevance to the provision of single-sex activities within school, the EIS briefing confirms the position within the current technical guidance:

“Where there is a difference in service or activity between boys and girls, transgender people should be treated according to their gender identity – or, if they are non-binary, on the basis that they have a choice (and this might alter from time to time). So, if a school activity is divided between boys and girls, a transgender boy should as the standard, be with the rest of the boys.”

Should the bill be further amended and pass into law, our guidance will be updated with further detail, as necessary, if there are changes to the current process in which young people have their gender identity recognised in school.

Objections to the GRR (Scotland) Bill

When the Gender Recognition Act (2004) was first introduced in the UK Parliament, a significant bulk of the opposition was on religious grounds, whereas today, members may come across frequent media attention on perceived risks.

The Bill will make the process of obtaining a birth certificate that matches a person’s gender identity less intrusive, which is misunderstood by some to mean that trans people will have new rights and entitlements to single-sex services. This is wrong – trans people already have access to single-sex spaces such as toilets, changing rooms and services on a basis of their gender identity, and services are permitted under exemptions to the Equality Act (2010) to provide a different service to trans people, where it is legitimately necessary – for example, if it is safer for the trans person.

Some of the opposition to the reforms proposed in the Bill relates to a concern that men, who are not trans, will pretend to be trans in order to obtain access to women-only spaces. This, in theory, is already a possibility within existing legislation, as most women-only spaces are on the basis of self-identification, not proof of birth certificate.

Single-sex services such as Women’s Aid and Rape Crisis have officially operated on the basis of self-identification for over a decade, and have robust risk assessments to ensure the safety of their service users – including the right to refuse service to anyone who is a legitimate threat to others.

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When the Bill was passed by the Scottish Parliament, the Office of the United Nation Human Rights office and the Council of Europe Commissioner for Human Rights welcomed the reform, citing it as a significant step forward in respecting the human rights of trans people.

Between 2018 and 2020, the UK Government considered their own reform of the GRA in England and Wales. After a year and a half of little update, this concluded with Liz Truss, then Minister for Women and Equalities, announcing the intention to make only minor changes to the Act with the intention of making the GRA process “kinder and more straightforward”, (by, for example, reducing the application fee from £140 to £5). The UK Government had no intention of introducing a self-declaration system or removing the need for a medical diagnosis. This announcement was met with disappointment and concern from leading LGBT and Equality organisations.

Close to a month after the passing of the GRR (Scotland) Bill, the UK Government announced it would use section 35 of the Scotland Act (1998) to block its implementation, citing concerns around interactions with the Equality Act (2010). Such interactions had already been considered extensively by the Scottish Parliament.

The UK Government has several options available in cases where it is concerned about aspects of a Scottish Bill adversely impacting reserved matters (such as the Equality Act (2010)). A section 35 order prevents the Bill from proceeding to Royal Assent, which it needs to become law. This is the first time that section 35 has been used to block a Bill passed by the Scottish Parliament.

It remains to be seen what consequences the UK Government’s decision will have on the passage of the Bill and on the wider constitutional balance of power between Holyrood and Westminster. We will continue to monitor developments and update this briefing as necessary.

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Tackling Gender Inequality

The EIS is clear that risks to women’s equality and safety is not the fault of trans people.

The EIS believes that Scotland is a patriarchal society in which women and girls continue to experience gender inequality, discrimination and stereotyping, as do gender-non conforming people.

Non-conformity with gender roles is still perceived as problematic by some, and children and young people are still mocked for and pressured around non-conformity, as we point out in our guidance ‘Get it Right for Girls - challenging misogynistic attitudes among children and young people’, which provides essential advice on tackling misogyny in educational establishments. However, the EIS believes that the continuation of essential efforts to tackle sexism should neither advertently nor inadvertently deny rights to transgender people.

The EIS believes it will remain important for organisations to keep records based on sex, in particular in relation to sex-based oppressions, deriving from biological functions such as being able to menstruate, become pregnant, give birth, and experience the menopause. Organising around women’s inequalities and holding women’s events and conferences, etc. should be transgender and non-binary inclusive.

Advice on addressing misinformation

It is an unfortunate consequence of the UK Government's decision, that further misinformation may be spread in relation to the GRA.

The EIS is aware that schools may be receiving lobbying material in the form of online pressure, physical flyers etc., implying inaccurate information related to the GRA or trans people, for example about sex and gender, single-sex spaces, or suggesting that young people are at risk in relation to their gender identities or due to the presence of trans pupils in schools. To be clear, trans people have always existed and being transgender is not a health and safety concern in and of itself.

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Teachers may be concerned that misinformation in schools may cause staff, pupils, or parents to worry or complain to the school. If you are concerned that someone in the school community has received misinformation in relation to the GRA, you can point them to this guidance or to the Scottish Government guidance on Supporting Transgender Pupils in School. Schools should ensure that they consult the necessary guidance and seek advice before taking any actions that may inadvertently signal unfounded risks, as this could further stigmatise and worry pupils.

You may also want to reach out to organisations such as the Time for Inclusive Education Campaign, who may have further advice or may be able to work directly with your school community.

If you are concerned about a young person (who may be personally negatively impacted by such lobbying material), you should follow your school's child protection and safeguarding protocols and Scottish Government advice.

Gender reassignment is a protected characteristic under the Equality Act (2010). If you are experiencing discrimination, harassment or victimisation because of being transgender, being inaccurately believed to be transgender or being associated with someone who is transgender, seek the support of your EIS Trade Union Representative.

The EIS has produced a series of visuals which can be shared online or printed and displayed, which contain useful information about transgender people and the GRA. To access these materials, visit www.EIS.org.uk/equality/LGBT

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Timeline

2004 - The Gender Recognition Act (2004) enters into effect. The legislation was introduced after the European Court of Human Rights ruling in 2002 that a trans person's inability to change the sex on their birth certificate was a breach of their Human Rights.

2017 – the Scottish Government publishes a review of GRA and announces intentions to reform in line with international best practice, stating that the GRA (2004) is out of date and intrusive.

2018 – The Scottish Government receives 15,500 consultation responses regarding how the GRA (2004) could be improved. Two-thirds (65%) of respondents agreed with the proposal of a statutory declaration system.

December 2019 - The Scottish Government publishes a draft Gender Recognition Reform (Scotland) Bill, opening consultation until March 2020.

March 2020 – The Scottish Government receives 17,058 responses, including 215 from organisations on the GRA consultation. Only 55% of respondents are residents in Scotland.

April 2020 - The Scottish Government announces de-prioritisation of new primary or secondary legislation due to the public health crisis.

June 2020 – The European Commission places GRA 2004 in the second to bottom category when comparing gender recognition access in 28 European countries, due to its intrusive medical requirements.

September 2020 – the UK Government publishes results of a public consultations showing majority support for reform but decides not to change the current law.

March 2022 – the Scottish Government publishes the Gender Recognition Reform (Scotland) Bill introducing improvements to the process of obtaining legal recognition for trans people. The Bill was subject to a third round of consultation by the Scottish Parliament's Equalities, Human Rights and Civil Justice Committee, which ran thirteen evidence sessions.

October 2022 – The Stage 1 vote of the Bill passes by a majority of 88 to 33, with 4 abstentions and 4 members not voting.

Early December 2022 – At Stage 2, a number of amendments are proposed, the majority of which did not pass.

20-22 December 2022 – the Bill is heard at Stage 3, with a final debate on 22nd December before a final vote. The Bill passes by a majority of 86 to 39, with no abstentions and 4 members not voting.

January 2023 – the UK Government announces the intention to make an order under section 35 of the Scotland Act 1998, to prevent the Bill from passing into law and moving to implementation (citing concerns about impacts on the operation of the Equality Act (2010)).

Glossary

Assigned sex – is a term used to describe the sex on someone's birth certificate, which is determined usually by visual inspection of the genitals of a baby just after birth.

Gender dysphoria – is a term used to describe discomfort or distress experienced by someone because their gender identity does not match with the sex they were assigned at birth.

Gender identity – is a term used to describe our innate sense of self in relation to being a man or a woman or something in between or beyond this binary.

Gender non-conforming (adjective) – is used to describe someone who appears not to conform to societal expectations of what are appropriate expressions of their gender, for example in terms of roles, behaviours, appearance. Anyone of any gender identity can be gender non-conforming.

Gender reassignment – in the Equality Act (2010). This term is used to refer to any part of a process of transitioning away from the sex assigned at birth, this can be socially, surgically, hormonally, etc.

Gender Recognition Certificate – a certificate that currently enables the holder to update the sex on their birth certificate and passport to reflect their gender

Non-binary (adjective) – is used to describe someone who does not identify strictly as a man or a woman.

Trans/transgender (adjective) – is an umbrella term used to describe anyone whose gender identity does not fully correspond with the sex they were ascribed at birth.

Trans man – a man who was assigned female as his sex at birth, but has a male gender identity.

Trans woman – a woman who was assigned male as her sex at birth, but who has a female gender identity.